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87-153

No. 87-

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UNITED STATES SUPREME COURT

October Term 1987

MR. W. FIREWORKS, INC.,

Petitioner,

v.

WILLIAM E. BROCK,
Secretary of Labor,
United States Department
of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35pp

QUESTIONS PRESENTED

I. Did the Court of Appeals misapply the clearly erroneous standard of Rule 52(a), and ignore this Court's decision in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), in holding numerous factual findings of the district court to be clearly erroneous, even while acknowledging that those findings were supported in the record?

II. Did the Court of Appeals erroneously construe Icicle Seafoods, Inc., v. Worthington, ____ U.S. ____, 89 L.Ed.2d 739 (1986), in holding the question of "employee" or "independent contractor" status under the Fair Labor Standards Act to be a legal conclusion rather than a factual inference subject to the clearly erroneous rule?

PARTIES

The parties to this proceeding are the petitioner (defendant below), Mr. W. Fireworks, Inc., a closely-held corporation with no parent companies, affiliates, or subsidiaries, and respondent (plaintiff below) William Brock, Secretary of Labor, United States Department of Labor.

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UNITED STATES SUPREME COURT

October Term 1987

MR. W. FIREWORKS, INC.,	)
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Petitioner,	)
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v.	)
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WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Mr. W Fireworks, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1987.

OPINIONS BELOW

The decision of the court of appeals is reported at 814 F.2d 1042 and appears at

pp. A1-A63 in the separate Appendix to this Petition. The judgment of the district court is not reported and is set out at pp. A66-A85.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1987. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND RULES

29 U.S.C. Sec. 203(d)(e):

> (d) "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2),(3), and (4) the term "employee" means any individual employed by an

employer.

29 U.S.C. Sec. 206(a):

> Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> . . . .

29 U.S.C. Sec. 207(a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1-1/2 times the regular rate at which he is employed.
>
> . . . .

29 U.S.C. Sec. 211(c):

> Every employer subject to any provision of this chapter or of any order issued under this

chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in Section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

Rule 52(A), Federal Rules of Civil Procedure, 28 U.S.C.:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of

> fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

The Secretary of Labor brought suit against Mr. W. Fireworks, Inc., on November 16, 1983 in the Western District of Texas, alleging violations of the record keeping, minimum wage, and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et seq. The basis for jurisdiction in the district court was 29 U.S.C.

Sec. 217 and 28 U.S.C. Sec. 1337.

Mr. W Fireworks, Inc., denied the allegations, asserting first, that vendors of its fireworks were independent contractors and thus outside the coverage of the FLSA; second, that the operation of fireworks stands were exempt from the wage and hour laws as amusement and recreational activities pursuant to 29 U.S.C. Sec. 213 (a)(3); third, that the fireworks vendors were exempt from the wage and hour laws as outside salesmen in accordance with 29 U.S.C. Sec. 213(a)(1); and fourth, that the commissions received by the fireworks vendors were sufficient to have discharged any liability that defendant may have had, as provided in 29 U.S.C. Sec. 207(i).

The case was tried to the district court without a jury from July 29 through July 31, 1985. Officers of Mr. W Fireworks, Inc., and a number of fireworks

vendors testified on both sides of the case. On January 29, 1986, the district court issued a memorandum opinion and judgment finding and concluding that the fireworks vendors were independent contractors rather than employees, and thus outside the coverage of the FLSA. (A66-A85).

Plaintiff appealed, and the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court, by opinion and order entered on April 20, 1987. The court ruled only on the independent contractor issue, remanding the issues of the possible exemption of Mr. W. Fireworks, Inc. from the FLSA under the "amusement or recreational" establishment exemption, or under the "outside salesmen" exemption to be addressed first by the district court.

Petitioner/defendant, Mr. W. Fireworks, Inc., is a family- owned corporation which has been in the business of importing and distributing fireworks in south Texas for about 25 years. Fireworks may be sold lawfully in the State of Texas only during two periods, referred to as "seasons": June 23 to July 5, and December 19 to January 2.

Defendant distributes fireworks through individual vendors, who operate wooden fireworks sales stands constructed by Mr. W. Defendant leases the land at various sites, places the stands, and bears the cost of electrical service to the stands. Before each season, Mr. W. advertises for vendors to operate the stands. About 20% of the operators repeat from one season to the next; the other 80% change each season.

Defendant enters into contracts with the vendors, which provide for their

receipt of fireworks on consignment from the defendant. The operators pick up their inventory of fireworks from Mr. W's warehouse the day before the season begins, and set up their display at the location they have chosen or been assigned. They hire their own employees to help them operate the stands. During the course of the season they may order additional inventory from Mr. W. which is delivered by a routeman who also picks up the cash proceeds if the vendors desire. At the end of the season they return any unsold inventory to Mr. W. and receive a 15% commission of the proceeds from the fireworks sold. Any errors or lost inventory are deducted from the proceeds paid to the operators.

From 1980 through January 1983, each vendor signed a set of defendant's "Rules and Regulations"; in subsequent seasons,

each vendor signed an "Independent Contractor Checklist". Most of the provisions on this document are restatements of state legal and regulatory requirements, such as not permitting smoking or setting off fireworks in close proximity to the fireworks stands, keeping the grass mowed and trash removed around the stands, and not selling fireworks to intoxicated persons. Because of a regulatory requirement that firework stands used for overnight storage of fireworks must be kept secure and equipped with suitable locking devices to prevent unauthorized entry, and because the light construction and portable nature of the stands makes this rule unenforceable through security devices alone, one of defendant's checklist items requires that the operators attend the stands 24 hours a day.

The "Rules and Regulations" forms

that were in use through January 1983, but not the "Independent Contractor Checklist" forms in use after that time, also stated that vendors must not sell goods other than fireworks purchased from defendant, that certain sales hours must be observed, and that defendant's prescribed resale pricing was to be followed. However, none of these provisions was ever enforced. After the adoption of the latter checklist, the hours of operation of 9:00 a.m. to 12:00 midnight were recommended, but not required. Defendant supplied a list of recommended prices and price tags, but these were not required to be followed. Vendors were also allowed to sell goods other than defendant's fireworks at the stands if they wished. Testimony from the operators at trial indicated that while many vendors chose to follow defendant's recommendations as to hours of operation and prices, others

deviated from those recommendations if they wished. Additionally, a number of vendors sold other goods at their stands, including fruit, Christmas trees, and toys.

None of the vendors who testified at trial regarded the fireworks business as their primary source of income. Many of them held responsible positions of employment, and operated their fireworks businesses at nights and on weekends or used their vacation time to work during the fireworks seasons. A great many of the vendors were college graduates, and some held advanced degrees.

Many of the stand operators invested capital of their own in their business, by placing advertising, and erecting signs or using promotional devices such as clowns to attract customers to their stands. Additionally, some operators purchased campers or tents in which to sleep near their

stands, telephone service for the stands, extra security measures, electronic calculators or cash registers, heaters, fans, and portable toilets. They paid for trash removal and maintenance of the grounds around their stands, and some purchased gravel, hay, or wooden pallets to alleviate muddy conditions.

The fireworks vendors earn an average of $1200 per 11- to 13-day season, but they can earn a great deal more than that, depending on their experience, skill and initiative. The evidence showed that overall good management, including an understanding of the products sold and the nature and peak times of customer demand, made a big difference in stand profitability. Neatness and attractiveness of the stand and the fireworks displays, as well as courtesy and rapport with customers, were found by experienced vendors to be

important ingredients of success.

The contracts between the defendant and the vendors provide that the vendors are independent contractors and not subject to the control of the defendant. Many of the operators testified that they considered the fireworks stands to be their own businesses and not the businesses of the defendant. Several of them testified that they would not have operated their firework stands for hourly wages.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW SET ASIDE VIRTUALLY ALL THE DISTRICT COURT'S FINDINGS OF HISTORICAL FACT, AND THE INFERENCES BASED THEREON, WITHOUT REGARD TO THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING THOSE FINDINGS, THUS MISAPPLYING THE CLEARLY ERRONEOUS STANDARD OF RULE 52(a) AND IGNORING APPLICABLE DECISIONS OF THIS COURT.

The district court, after hearing three days of testimony from defendant's employees and numerous fireworks vendors, wrote a carefully reasoned opinion analyz-

ing the employee-independent contractor question by applying the five considerations delineated in United States v. Silk, 331 U.S. 704 (1947): degree of control, opportunities for profit or loss, investment in facilities, permanency of the relationship, and skill required. After detailing the evidence under each of these factors, the court found that the fireworks vendors were not economically dependent on Mr. W. Fireworks, Inc. and therefore that they are independent contractors, not employees. The court of appeals, after stating that the district court had correctly identified the five Silk factors in making its analysis, and acknowledging that its findings as to the existence of those factors were subject to the clearly erroneous standard of review, then applied the same five factors and made opposite findings on each. Because the district

court's findings were based on an entirely permissible view of the evidence, the court of appeals overstepped the bounds of its duty under Rule 52(a) in setting aside those findings in favor of its own view of the evidence. In doing so, the Fifth Circuit ignored the admonishments contained in Pullman-Standard v. Swint, 456 U.S. 273 (1982) and Anderson v. City of Bessemer City, 470 U.S. 564 (1985).

In its review of the evidence under each of the Silk factors, the Fifth Circuit dismissed virtually every finding of the district court as either clearly erroneous, drawn from the wrong legal standard, or "legally irrelevant". Yet a review of both opinions reveals that the evidence in the record, while it was, not surprisingly, in conflict, fully supported the district court's findings. Thus, on the issue of "control," the district court found that

although the operators received a list of suggested prices with their initial inventory, they considered them to be only suggested prices, felt free to change them if they wished, and sometimes did change them depending on how well an item sold. The court of appeals, however, considered this finding clearly erroneous because only three operators testified that they occasionally reduced prices, while ten stated that they never did. Many of those ten, the court noted, indicated that they felt compelled to adhere to the suggested prices. The court failed to note that many of those operators also stated that they did not feel compelled to follow Mr. W's price list, but did so simply because they assumed it would maximize their profits. Likewise, the court of appeals chided the district court for finding that many operators varied the suggested hours of

operation, or the suggested display instructions, when many operators also did not do so. The Fifth Circuit dismissed as "legally irrelevant" to the control issue the district court's finding that some operators made improvements to their stands, sold other merchandise at their stands, and preferred being paid by commission. Thereupon, it reversed the district court's finding on the control factor and substituted its own, that Mr. W. Fireworks controlled the operators.

On the factor of opportunity for profit and loss, the district court found that the operators could greatly affect their profits by investing in extra advertising or promotion, and by gaining experience concerning display, types of fireworks, and customer courtesy. In fact, all the operators who testified they had worked more than one season stated that

they increased their profits as they became more experienced. Additionally, the court found that the operators risked substantial losses because they were responsible for the inventory; one showed a cash loss of approximately $3,000, and one operator an inventory loss of approximately $1800. The court of appeals, however, stated that "[C]ontrary to the district court's findings, we have already held that Mr. W controlled the prices at which the operators sold the fireworks, and, in large part, the advertising." In that court's opinion, those factors that it had already determined to be controlled by Mr. W. outweighed any findings of the district court on the opportunity for profit and loss, and it therefore found the opportunity for profit and loss to be controlled mainly by Mr. W.

On the factor of "investment", the

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district court recited numerous items that many vendors testified they paid for themselves in connection with the operation of their stands, such as campers, trailers, cash registers, adding machines, fans, heaters, telephones, paint and lights. The court noted that the more successful operators generally had invested more money in their businesses in order to increase their profits, which was typical of an independent contractor. The Fifth Circuit disagreed with many of these findings, apparently because the evidence did not show that all operators made large investments in their stands. In the opinion of the court of appeals, the investments that they did make were irrelevant, because Mr. W made the much larger investment of buying the fireworks and supplying the stands. Similarly, the court of appeals dismissed the district court's finding that

many operators displayed "skill and initiative" in operating the stands and thereby increased their profits. Disregarding the evidence that many operators felt it was critical to their profits that they learn to gauge the customer demand for particular items and the peak times of demand and to hire their employees accordingly, the court of appeals held that the operators did not exhibit sufficient independent skill or initiative to indicate that they were independent contractors.

Finally, on the issue of "permanency", the court of appeals indulged in blatant misreading of the record while cavalierly dismissing the district court's analysis of this factor as "the most important of all." In the opinion of the court of appeals, it was insignificant that almost all of the vendors had full-time jobs and worked for defendant only to make extra

money during holidays and vacation. Yet the court of appeals likened these vendors to migrant farm workers, who are utterly dependent on a succession of crop harvesting jobs in various parts of the country. There was no evidence that these vendors drifted from fireworks stand to fireworks stand in order to eke out a living. In finding that these fireworks vendors must be considered "permanent" employees of Mr. W. the court stated: "the record establishes beyond cavil that every operator who ever worked for Mr. W. labored through the entire fireworks season." In fact, the evidence was that Mr. W had never terminated any vendors during a season; there was no testimony that vendors had never voluntarily quit their stands in the midst of a fireworks season. Furthermore, there is an 80% turnover in defendant's vendors between each season.

Not surprisingly, after it had discarded all of the district court's factual findings and substituted its own, the court of appeals rejected what it characterized as the district court's "ultimate conclusion" that the fireworks operators were independent contractors, and concluded instead that they were employees subject to the controls of the FLSA. What the court of appeals actually did was to duplicate the role of the district court and engage in its own fact finding, in order to arrive at the conclusion the court of appeals would have reached, had it been sitting as the trier of fact. As the district court recognized, there was evidence pointing both ways on all of the factors to be considered under the Silk analysis. The district court made its determination based upon its assessment of the weight of the testimony of various

operators and their credibility, and then drew its inferences from these factual findings. Both of these types of findings were entitled to the deference required by Rule 52(a).

Clearly there were two permissible views of the evidence in this case, and the court of appeals simply chose the opposite view from the district court. In doing so it disregarded this Court's holding in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), citing only Justice Powell's concurring opinion in that case for the proposition that the clearly erroneous standard must not serve as an excuse for the court of appeals to abrogate its "role and duty as a reviewing court." This intentional disregard of the standard so strongly and recently announced in Bessemer City constitutes such a departure from the accepted and usual course of

judicial proceedings as to call for an exercise of this court's power of supervision.

II. THE COURT OF APPEALS ERRONEOUSLY TREATED THE QUESTION OF EMPLOYEE STATUS UNDER THE FLSA AS A LEGAL CONCLUSION, THEREBY CHANGING A FACTUAL FINDING OF THE DISTRICT COURT WITHOUT FINDING IT CLEARLY ERRONEOUS, AND MISAPPLYING ICICLE SEAFOODS, Inc., v. WORTHINGTON, ____ U.S. ____, 89 L.Ed.2d 739 (1986).

While at least acknowledging that the district court's findings as to the existence of the Silk factors must be considered factual findings subject to the clearly erroneous rule, the Fifth Circuit adopted the Secretary of Labor's position that "[T]he ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts." Although the court declared that its ruling was supported by this Court's recent decision in Icicle Seafoods, the

court of appeals' ruling in fact conflicts with the Icicle Seafoods holding and with many of its own prior decisions.

In Icicle Seafoods, Inc. v. Worthington, ____ U.S. ____, 89 L.Ed.2d 739 (1986), the Court dealt with the question of an FLSA exclusion for "any employee employed as a seaman." Noting that the Court of Appeals for the Ninth Circuit had pointed out the conflicting standards of review applied to claims of exclusion from the FLSA in various circuits, the Court reviewed three prior decisions in this area: Walling v. General Industries Co., 330 U.S. 545 (1947); Levinson v. Spector Motor Service, 330 U.S. 649 (1947); and Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). This Court reaffirmed its holding in Walling "that whether an employee falls within the exclusion for 'executives' under 29 U.S.C. Sec. 213(a)(1)

is a factual question subject to the 'clearly erroneous' standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure." 89 L.Ed.2d at 743. It stated that neither Levinson nor Rutherford should be read to depart from the rule laid down in Walling. The Court disapproved of the application of a de novo standard of review to the application of the exemption to the facts in Icicle Seafoods, while reaffirming its holding in Walling "that the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts." 89 L.Ed.2d at 744.

Although the reference to Walling should make clear that the Court intended any exempt status under the FLSA to be

reviewed pursuant to Rule 52(a), the Fifth Circuit has in this case interpreted Icicle Seafoods to support its ruling that the question of employee status is one of law subject to plenary review by the courts of appeals. In doing so the court also chose to reject its own prior cases holding to the contrary: Wirtz v. Lone Star Steel Company, 405 F.2d 668 (5th Cir. 1968); Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973); and Donovan v.Sabine Irrigation Co., Inc., 695 F.2d 190 (5th Cir. 1983).

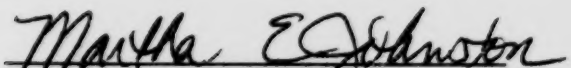
The Fifth Circuit's misinterpretation of the Icicle Seafoods holding resulted in its application of a de novo standard of review to the district court's ultimate determination that the fireworks vendors in this case were independent contractors and not employees. This Court's writ should issue to correct the court of appeals' view

of the appropriate standard of review in this area, because it is a constantly recurring question that is of central importance to the operation of the federal court system.

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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APPENDIX
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 86-2170

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)
Plaintiff-Appellant,	)
v.	)
MR. W. FIREWORKS, INC.,	)
Defendant-Appellee,	)

April 20, 1987

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

In 1983, the Secretary of Labor (Secretary) brought suit against Mr. W.

Fireworks, Inc. (Mr. W), alleging continuing violations since 1980 of the record-keeping, minimum wage, and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et seq. (FLSA or Act). The only question presented in this appeal is whether the operators of Mr. W's fireworks stands are "employees" within the meaning of the FLSA.

In 1938, Congress passed the FLSA in order to palliate the grave economic ills then ailing our nation. The treatment prescribed is relatively simple-mandatory minimum wages to ameliorate depressed earnings, and overtime penalties to induce shorter working hours. Before ordering putative employers to swallow the congressional pill, however, courts must first ensure that the relevant business suffers from an FLSA illness, viz., that the etiology derives from actual employees, and

thus that the Secretary is not a legal hypochondriac.

This FLSA diagnosis is not always easy to perform; congressional intent requires inquiry into the myriad symptoms manifested. There are no neat diagnostic formulas, only rough guidelines and checklists to determine employee status. After scrutinizing various factors through our judicial microscope-no one of which is independently determinative-we must discover whether the alleged employees, as a matter of "economic reality," are "economically dependent" on the business to which they supply their labor and services. Courts must not be overly cautious or tentative in reaching this diagnosis, for Congress intended the Act's prescriptive scope to be expansive.

Following a three day bench trial, the district court determined that Mr. W's

operators were not employees under the Act. Having carefully examined the record, we reverse.

I. The Standard of Review of Determinations Regarding Employee Status

The legal standards that determine employee status under the FLSA illuminate the proper standards of review of the district court's determination. We have generally, though not always, employed a five part test, derived from United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947): (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the putative employee and employer; (3) the degree to which the "employee's opportunity for profit and loss is determined by the "employer"; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. See, e.g., Usery v. Pilgrim

Equipment Co., 527 F.2d 1308, 1311 (5th Cir.), cert. denied, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed. 89 (1976); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662,666 (5th Cir. 1983). These factors are not exhaustive, nor can they be applied mechanically to arrive at a final determination of employee status. Rather, they must always be aimed at an assessment of the "economic dependence" of the putative employees, the touchstone for this totality of the circumstances test. See, e.g., Robicheaux, 697 F.2d at 665 (focus is "whether the employees 'as a matter of economic reality are dependent upon the business to which they render service'") (quoting Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975) (quoting Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547, 1550, 91 L.Ed. (1947)). Moreover facile labels and

subjective factors are only relevant to the extent that they mirror "economic reality." See e.g., Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961).

> No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges the dominant factor--economic dependence.... The five tests are aids--tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently independent to lie outside its ambit.

Pilgrim Equipment, 527 F.2d at 1311-12 (citation omitted) (emphasis in original); see e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772

(1947); Castillo v. Givens, 704 F.2d 181, 190 (5th Cir.), cert. denied, 464 U.S. 850, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983); Robicheaux, 697 F.2d at 666; Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 1189 (5th Cir. 1979).

There are thus three types of findings involved in determining whether one is an employee within the meaning of the Act. First, there are historical findings of fact that underlie a finding as to one of the five Silk factors; for example, whether Mr. W controlled the number of hours that an operator must be at a stand. It is beyond cavil, and neither of the parties dispute, that these findings of historical fact are subject to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a).

Second, there are those findings as to the Silk factors themselves. The

Secretary argues that these are mixed questions of fact and law, subject to plenary review. Mr. W asserts that these are questions of fact, subject to the clearly erroneous rule. We agree with Mr. W. Findings as to control, investment, skill and initiative, opportunity for profit and loss, and permanency are plainly and simply based on inferences from facts and thus are questions of fact that we may set aside only if clearly erroneous. See Icicle Seafoods, Inc. v. Worthington, __ U.S. __, 106 S.Ct. 1527, 1529, L.Ed.2d 739 (1986) ("the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the Courts of Appeals pursuant to Rule 52(a)"); Castillo, 704 F.2d at 185; Donovan v. Dial America Marketing, Inc., 757 F.2d 1376, 1383 (3d Cir.), cert. denied, __ U.S. __,

106 S.Ct. 246, 88 L.Ed.2d 255 (1985); cf. Pullman Standard v. Swint, 456 U.S.273 102 S.Ct. 1781,1789, 72 L.Ed.2d 66 (1982) (intentional discrimination under Title VII is finding of fact subject to the Rule 52(a) clearly erroneous standard of review).

Two caveats are necessary, however. Although we may only set aside factual findings of the district court if we have a firm and definite conviction that a mistake has been made, United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), this must not serve as an excuse to avoid comprehensively canvasing the record with great care. See Parker v. Mississippi State Dept. of Public Welfare, 811 F.2d 925, 929-30 No. 86-4234, slip op. at 2757 (5th Cir. 1987). For us to do otherwise, would abrogate our role and duty as a

reviewing court. See Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 1515, 84 L.Ed.2d 518 (1985) (Powell, J., concurring). Congress surely did not intend Rule 52(a) to constrict as a Victorian corset, binding the courts of appeals to the findings of the district court absent a careful and fitting examination. Second, we must ensure that the factfinding of the district court is performed with the proper legal standards in mind. Only then can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact. The district court's analysis, of course, is subject to plenary review by this court, to ensure that the district court's understanding of the law is proper. See Icicle Seafoods, 106 S.Ct. at 1530.

Finally, the district court must reach an ultimate conclusion that the workers at

issue are "employees" or "independent contractors." The Secretary urges that this is a legal conclusion, subject to plenary review. Mr. W, however, argues that this finding also is an inference from fact, subject to the clearly erroneous rule. Here, we agree with the Secretary. The ultimate finding as to employee status is not simply a factual inference drawn from historical facts but more accurately is a legal conclusion based on factual inferences drawn from historical facts. We thus have held repeatedly that the ultimate determination of employee status is a finding of law subject to de novo consideration by this court. See Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 & n. 24 (5th Cir. 1985) (citing and reconciling cases).

Mr. W, however, argues that we are not bound by Beliz, because earlier panels of

this court have taken a different view as to the proper characterization and scope of review of this finding. See id. (citing cases to be reconciled). Although it is possible that we are not bound by Beliz, we believe that its holding is proper and is strongly supported by the recent Supreme Court opinion in Icicle Seafoods. There, in discussing the proper standard when reviewing an analogous FLSA question, whether a worker is a "seaman," Justice Rehnquist writing for a unanimous Court plainly indicated that the ultimate conclusion regarding seaman status is a question of law, subject to plenary review by the courts of appeals. Id. 106 S.Ct. at 1529.

In sum, then, both the district court's findings as to the historical facts and its findings as to the five Silk factors are subject to the clearly erro-

neous rule, given a proper understanding of the relevant law. Its determination that the operators are not employees but independent contractors is a legal conclusion, subject to plenary review.

II. Factual Background and the District Court's Historical Factfindings

Mr. W, a closely-held, family owned corporation, owns some 100 fireworks stands, which are operated across South Texas. The fireworks business is by nature seasonal, because Texas law permits fireworks to be sold only during a 13-day season culminating on January 1st, and during an 11-day season culminating on July 4th.

Mr. W operates an office and warehouse in Somerset, Texas, a suburb of San Antonio. From its office, Mr. W recruits operators, acquires land for fireworks stands, constructs stands, employs 5 or 6 routemen to supply the stands with fire-

works, and advertises.

The district court made no factual findings as to the nature and amount Mr. W has invested in its stands. The record reveals, however, that Mr. W's investment is considerable. It procures land, through lease or otherwise,[1] in order to place the stands. In determining where to locate stands, Mr. W checks local fireworks ordinances, conducts market and demographic surveys, and engages an attorney to negotiate and to enter into leases to secure the property on which stands are to be placed. Mr. W then determines the appropriate stand size, ranging from 24 to 96 feet, for the particular location.

Mr. W procures the necessary materials

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[1] Four or five operators during the relevant period owned the land on which the stand was located. In compensation for the value of their property, they received additional commission relative to the other operators. See infra note 3.

to build the stands and hires contractors to construct them at its warehouse. The stands are painted a common color, with a common Mr. W logo, and then transported to the locations selected by Mr. W. Most stands are kept at their sites throughout the year, but periodically must be returned to the warehouse for regular maintenance.

In addition, Mr. W buys and imports from Asia the fireworks that it supplies to the operators, and pays the salary of its employees stationed at Somerset. Mr. W must procure licenses and insurance for all the stands. It also pays for electrical services at all the stands, and secures newspaper ads both to recruit operators and to increase business. Finally, Mr. W pays the operators themselves.

As to the operators, the district court found that "[w]hile [Mr. W] did

reimburse the[m] ... for some of their advertising and other expenses, many operators, in particular those who were most successful, invested their own money in the businesses." Op. at 7. The district court specifically found that operators purchased hay, gravel, and pallets. Operators are responsible for trash collection, pay the entire cost of renting a portable toilet,[2] and pay for various devices to improve business conditions, security, and the personal living environment at the stands. The cost of "feeding, housing and paying [the operators'] employees is substantial." Id.

The court also found that Mr. W exercises little control over the operators. All the operators signed a standard-form contract with Mr. W that is not

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[2]For a few years during the relevant period Mr. W paid one-half of the cost of renting portable toilets.

subject to modification or negotiation. The initial contracts and rules, which were operative until 1983, "seemingly enabled [Mr. W] to exercise control over the stands by setting hours and prices, and by prohibiting the sale of other merchandise by the operators." Id. at 2-3. But those contracts and rules "referred to the operators as independent contractors, and gave them sole control over day-to-day activities." Id. at 3. Following an investigation by the Wage & Hour Division of the Department of Labor in 1983, Mr. W (at the behest of its attorney) modified both the contract and the rules. The hours of operation (9:00 a.m. to midnight) were "suggested," and the prohibition against selling other merchandise was formally eliminated. In any event, the district court found, "[t]here is no evidence that [Mr. W] enforced any rule or regulation

against any [operator]." Id. at 6.

Rather, "[a]fter [Mr. W] placed a[n[[operator] in business, by arranging for the stand and initial inventory, the [operator] took charge and controlled all aspects of the business." Id. "[E]ven though the early contracts and rules reserved the right of control, there was virtually no evidence that [Mr. W] ever exercised this control over operators." Id. at 4. (emphasis in original). Although price tags and a suggested price list accompanied deliveries of initial inventory, "the operators considered these to be suggested prices only, and felt free to change them, which they sometimes did." Id. at 4-5. Similarly, "[a]lthough the initial inventory came with suggested display instructions, the operators could and did alter the display." Id. at 5. Most operators controlled their own hours, but

"[t]he operators are advised that, in accordance with state law, the stands must be attended 24 hours per day." Id. Finally, the operators perform "many improvements" on the stands, engage in independent advertising, sell merchandise other than Mr. W fireworks, and exercise sole control over hiring, supervising , and paying the helpers that they "employ" to work at the stands. Id. Thus, the district court found that neither the rules nor the contract are enforced by Mr. W, and that the operators exercise control over the business.

The court next determined that the operators have extensive opportunities for profit and loss. The operators are paid a 15% commission on fireworks sold.[3] The operators' commission is calculated by subtracting the cost of merchandise

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[3]Mr. W paid the few operators who owned the land on which the stand was located a 25% commission. See supra note 1.

returned at the end of the season to Mr. W by the operator from the merchandise Mr. W delivers to the operator, then by computing 15% of this difference, less state and local sales taxes. The base price of the inventory difference is Mr. W's "suggested" retail price. Because all merchandise not returned is assumed to have been sold (at the suggested list price), the operator is held responsible for all losses due to theft and other causes. Indeed, the record shows that one operator sustained a loss of $3,000 and another had an inventory loss of $1,800. Thus, the district court determined that the operators are "susceptible to a substantial loss[,] [and] it is unlikely that a[n] [operator] would accept this risk of loss without the opportunity to make a large profit." Id. at 7.

The court conclusively found that the operators "display initiative to increase

business." Id. "[W]hile no particular skill [i]s necessary to open a stand, prior experience in sales and as a supervisor would be helpful." Id. at 8. Additionally, experience in selling fireworks directly correlates with proficiency and profits.

Finally, the district court found that the operators do not have a "permanent" relationship with Mr. W, because of the seasonal nature of the business. Because the fireworks business is not their primary source of income, the operators are not "economically dependent" on Mr. W for subsistence. The trial court thus concluded that the operators are "independent contractors," not "employees."

III. Review of the District Court's Application of the Silk Factors

The district court properly identified the five Silk factors in making its analysis. But after carefully canvassing the entire record, we are firmly and

definitely convinced that the court's findings as to several important historical facts are mistaken, as are the inferences drawn therefrom. In addition, the court employed the wrong legal standard in drawing several inferences, and considered several factors that are legally irrelevant to a determination of employee status.

A. Control

The district court determined that the operators are "able to operate the stands and d[o] operate the stands independently of" Mr. W. Several of the court's historical findings are clearly wrong, and others are irrelevant as a matter of law. We therefore hold that the district court's finding as to control is clearly erroneous.

The court first found that, although Mr. W supplies the operators with a list suggesting the retail price and with preprinted price tags, the operators can

and do change the prices. This finding simply is not supported by the record. In addition, as the district court recited but failed to apply, it is not what the operators could have done that counts, but as a matter of economic reality what they actually do that is dispositive. Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. (1974) ("It is not significant how one 'could have' acted under the contract terms. The controlling realities are reflected by the way one actually acts."); Pilgrim Equipment, 527 F.2d at 1308 (citations omitted); see Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953, 1961, 1962, 85 L.Ed.2d 278 (1985).

Three operators testified that they usually followed Mr. W's suggested retail prices, but that they occasionally reduced prices to repeat customers who bought

fireworks in high volume. Ten operators unequivocally testified, however, that they never deviated from Mr. W's retail prices, and that they used Mr. W's price tags to mark the prices of the merchandise. Moreover, many of these ten operators indicated that, as a result of the contract, they felt compelled to adhere to Mr. W's "suggested" prices. The district court does not indicate in its findings that the testimony of the ten operators who adhered to Mr. W's "suggested" prices was less credible than that of the three who deviated. Although the testimony of the three operators arguably indicates that they could alter prices in the fashion of an independent businessperson, their own testimony indicates that they rarely did so. The other testimony establishes that most operators did not ever deviate from Mr. W's "suggested" prices. Therefore, we

must conclude that, as a matter of economic reality, Mr. W exercises extensive control over the prices charged by the operators for the fireworks. The district court's findings of fact to the contrary are clearly erroneous.

The court also concluded that "most operators controlled their own hours." Op. at 5. The court noted that several operators testified to having maintained hours from 9:00 a.m. to midnight in order to conform to their understanding of the contract, but that "no one was ever sanctioned for opening late or closing early." Id. We cannot say that this finding as to the hours of business operation is clearly erroneous, but it ultimately has little to do with Mr. W's control over the hours that the operators actually worked.

The district court erroneously found

that the operators are required to attend the stand twenty-four hours a day to comply with the Texas regulatory scheme. All operators who testified stated that they were present at the stand after "business hours" to comply with this regulation. The district court characterized this requirement as mandated by state law, and thus implicitly not mandated by Mr. W. But in fact state law makes no such requirement. State law only mandates "that fireworks stands used for overnight storage of fireworks must be equipped with suitable locking devices to prevent unauthorized entry." Brief for Appellee at 5; see Texas Board of Ins. Rules and Regulations, Rule 059.41, 592(b). It inescapably follows that it is Mr. W, not state law, that requires the operators (or their helpers) to attend the stands twenty-four hours a day. As a matter of economic reality,

therefore, Mr. W exercises great control over the hours of the operators.

The court next found that, although the operators received instructions for displaying merchandise when Mr. W delivered their initial inventory, the operators "could and did alter the display." Op. at 5. On reading the record, we hold that this finding also is clearly erroneous. Six operators unequivocally testified that they followed Mr. W's display instructions to the letter; only one testified that he did not follow them.

The court also found that because "many operators, on their own to increase their business and thus their commission, advertised on radio, in the newspaper, with signs and by distribution of flyers," the operators exercised such control as to indicate that they functioned independently of Mr. W. Id. (emphasis added). Mrs. Wild-

man, the treasurer, bookkeeper, and part owner of Mr. W, testified to knowing of only eight instances of independent advertising by operators over the past five years. One operator testified that he placed an advertisement in the newspaper. But he also testified that he was reimbursed by Mr. W. This same operator testified that he was given free radio time by a local station. Another operator testified that, for three of the six seasons she was affiliated with Mr. W, she purchased $70 worth of radio advertisements. Only four operators testified to placing a few signs to attract business. Crediting Mrs. Wildman's testimony, the most one could possibly infer on this record is that eight of a possible 100 operators per season for ten seasons, engaged in independent advertising. Therefore, contrary to the finding of the district court, we conclude

that the overwhelming majority of operators did not engage in independent advertising.

Other findings of the district court, though not clearly erroneous, either are legally irrelevant to a finding of control or are of insufficient weight to overcome those factors previously discussed, which indicate Mr. W's control over the operators. The district court found that the operators "performed many improvements on the premises[,] such as painting, mowing, displaying of lights, and building fences. Id. While this finding accurately reflects the record, it is not probative of control and, ultimately, of economic dependence. It is true that some operators made some, but not many, improvements. But the record also establishes that most operators made few or no such improvements. The record shows that three operators mowed the grass around their stands, one operator built a

fence, one operator painted the interior of the stand, and one operator, without being reimbursed by Mr. W, erected lights. Thus, the record falls far short of showing that most or even many of the some 1000 operators made improvements to the stands during the relevant period without reimbursement by Mr. W.

The district court correctly noted that "[t]here was ... evidence that other merchandise, including fireworks not distributed by ... [Mr. W] (which appeared in the final inventory), were sold at the stands." Id. Mrs. Wildman testified that some operators sold other brands of fireworks, and that she knew of four operators who had sold Christmas trees, watermelons, or "UFOs" (styrofoam kites). But Mrs. Wildman did not testify as to the extent of sales of items other than Mr. W fireworks, and the testimony of the

operators revealed that the sales of other merchandise were at most de minimis. Only two operators testified that they had sold merchandise other than fireworks. One testified that he purchased Christmas trees two days prior to Christmas and was able to sell a few at twenty-five cents a piece. Another operator testified that he sold popcorn, citrus fruit, and pecans at the stand. The sale of such incidental items simply is irrelevant as a matter of law. "These sales minimally supplemented their income. [But] [s]uch minor additional income made from work which is not connected with the actual business under examination is not relevant to a court's determination of employee status." Pilgrim Equipment, 527 F.2d at 1313 (citing Partida, 492 F.2d at 709). Further, the testimony of the operators does not suggest that they received any supplies of

fireworks from suppliers other than Mr. W; they testified only to receiving supplies from Mr. W's routemen, or to picking them up themselves at the Somerset warehouse. Thus, it is indubitably clear that Mr. W, as prescribed in its initial contract, as a matter of economic reality controlled the merchandise that the operators sold at the stands.

Finally, the court noted accurately that several operators testified that they would not have accepted the job but for the fact that they were paid on commission; "they would not have worked at the stand for an hourly wage." Op. at 6. The method of payment, however, is legally irrelevant to a finding of control, or to any other finding relating to employee status. See United States v. Rosenwasser, 323 U.S. 360, 65 S.Ct. 295, 296-97, 89 L.Ed. 301 (1945). The subjective feelings of the operators

regarding their prefered method of payment are equally irrelevant. There is neither a logical nor legal nexus between the operators subjective desires regarding their prefered method of payment and a finding of their employment status. Subjective beliefs cannot transmogrify objective economic realities. "A person's subjective opinion that he is a businessman rather than an employee does not change his status." Robicheaux, 697 F.2d at 667.

Mr. W controls the location and size of the stands, the fixing of prices, the merchandise sold, the display of the merchandise, the hours that operators must attend the stands, most of the advertising, and the method of paying the operators. It is true, as the district court noted, that the operators have the sole authority to hire their own employees and to set their wages and hours. But "[i]n the total

concept of the relationship neither the right to hire employees nor the right to set hours indicates such lack of control ... as would show these operators are independent...." Pilgrim Equipment, 527 F.2d at 1313; see Mednick, 508 F.2d at 301; Castillo v. Givens, 704 F.2d at 190; Real v. Driscoll Strawberry Associates, 603 F.2d 748, 755 (9th Cir. 1979).

> The most significant conclusion from all these facts is that the operators cannot exert control over any aspect of their business lives independent[ly].... They have no visible economic status that can be traded to other... companies [in the same business] and the lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence. Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.

Pilgrim Equipment, 527 F.2d at 1312-13. The entire record clearly and unmistakeably demonstrates that all "meaningful"

aspects of this business are controlled by Mr. W and that the operators are economically dependent on Mr. W. Indeed, the operators could not function without Mr. W. We, therefore, have a definite and firm conviction that Mr. W controlled the operators. The finding of the district court to the contrary is clearly erroneous.

B. Opportunity for Profit and Loss

This district court found that the operators had significant independent opportunities for profit and loss, indicating that they were independent contractors, not employees. This finding is clearly erroneous as well.

The court found the operators could affect their "profits" by placing advertisements, controlling prices, and improving management and sale techniques. The court found that "[t]he more experienced operators learned that courtesy to custom-

ers and the neat appearance of the stand were important to attract more business, as was knowledge of what fireworks do." Op. at 6. Finally, after noting that one operator "showed a cash loss of approximately $3,000 ... and one [operator] an inventory loss of approximately $1,800," the court determined that "[a]n employee would not be held responsible for such losses. It is unlikely that a[n] operator would accept this risk of loss without the opportunity to make a large profit." Id. at 7.

Contrary to the district court's findings, we have already held that Mr. W controlled the prices at which the operators sold the fireworks and, in large part, the advertising. Second, although experience and courtesy to customers may to some degree enhance an operator's commission, this is equally true of all commissioned employees and of employees earning gratui-

ties. See Rutherford Food Corp., 67 S.Ct. at 1476; Mednick, 508 F.2d at 301. Third, the record shows that the location and size of the stand--controlled by Mr. W--looms large in determining the amount of commission earned.

The opportunities for profit and loss in this case are remarkably similar to the opportunities for profit and loss in Pilgrim Equipment, 527 F.2d at 1313:

> The lower court concluded that the opportunities for profit or loss were the same as in any independent business. The major determinants of profit which an operator could make, however, were directly controlled by Pilgrim. Since the operators were paid on a percentage basis, the amount of business done by an operator governs total profit. The lower court found that convenience of hours, extra service provided, and rapport with customers were factors which affected profits and were within the control of each operator. However, price, location, and advertising--determinants of customer volume at least as vital as those governed by the operators--are regulated by Pilgrim.

The lower court attempted to distinguish Pilgrim Equipment by noting that operators bear the risk of losses due to theft. But this case is on all fours. As we noted in Pilgrim Equipment, the operators cannot negotiate regarding the terms of their compensation, and thus "that the operators accept responsibility for bad-check and theft losses does not show independence. Rather it shows ... [the alleged employer] chose to place this added burden on its operators." Id at 1313; see Mednick, 508 F.2d at 301; Donovan v. Sureway Cleaners, 565 F.2d 1368, 1369-70 (9th Cir. 1981). Mr. W unilaterally established the operators' rate and means of compensation; the standard form contract establishing the operators' responsibility for losses was drafted and presented by Mr. W without any opportunity for negotiating its terms. That two of 1000 operators during

the relevant period sustained substantial paper losses cannot distinguish this case from Pilgrim Equipment. The "losses," moreover, were not real losses, only reductions in the amount of sales for which an operator could earn commission.

Additionally, the vast majority of operators made only minor investments in the business, see post, slip opinion page 3423, page ___. For the most part, the operators' only "'expenditures' from which the[y] ... obtain a return is [on] their own labor ...." Such returns are more properly classified as wages, not profits." By contrast, "[p]rofit is the gain realized from a business over and above its [capital] expenditures." Brock v. Lauritzen, 624 F.Supp. 966, 969-70 (E.D. Wis. 1985) (quoting Silent Woman, Ltd. v. Donovan, 585 F.Supp. 447, 451 (E.D. Wis. 1984); see Mednick, 508 F.2d at 301.

Thus the record reveals that these operators are far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments. We therefore hold that the opportunity for profit and loss is controlled mainly by Mr. W, and that this factor points to economic dependence.

C. Investment

The district court found that "many operators, in particular those who were most successful, invested their own money in the businesses." Op. at 7. In drawing this inference, the court made many findings of fact that are clearly erroneous, employed the wrong standard or law, and considered several factors that are legally irrelevant. Finally, the court erred as a matter of law by failing to make findings as to the absolute and relative

investment of Mr. W compared to that of the operators, before concluding that the operators' investments indicated economic independence from Mr. W.

In particular, the court found that operators

> purchased hay, gravel, and pallets to cover muddy areas around the stand, and were responsible for trash collection ....[T]he operators now pay the entire cost [of a portable toilet]. [Operators] pay for campers, trailers or tents they use as sleeping quarters at the stand, security systems, cash registers, computers, adding machines, "bug zappers", [sic] calculators, fans, heaters, office supplies, "beepers", [sic] telephone, inspect repellent, paint and lights. The expense of feeding, housing and paying employees is substantial and is solely the responsibility of the [operator].

Op. at 7.

Mrs. Wildman testified that she knew of one stand that had utilized pallets, and of none that had used hay. Two operators testified that they purchased hay, gravel

and pallets--at a cost of $25 to $30--
without being reimbursed by Mr. W. (One operator testified that he also made such purchases, but that Mr. W reimbursed him). Two operators testified that they purchased bug lights without reimbursement, at eight to ten dollars; another operator made such purchases, but Mr. W reimbursed him. Three operators purchased several cans of bug repellant--from three to six cans at a price of two to four dollars--without reimbursement. Two operators purchased a "bug zapper." One operator testified that he purchased a security system for the stand at a price of $85 to $90, and used a family pet as a watchdog. Four operators testified that they leased toilets, which ranged in price from $28 to $72 per season. Two operators testified that they incurred some expenses in trash removal. Three operators testified that they used

cash boxes or registers, but one acquired a wooden cash box without cost, and another brought a cash box from home. Three operators testified that they purchased fans for the stand, but they also used the fans at home. Similarly, while two operators used portable heaters at the stand, one operator brought in a heater from home. One operator testified that he used a computer to assist him while working at the stand, but this involved no investment because he originally had purchased the home computer for school work. Five operators testified that they purchased one or more calculators (several more were brought from home), at a total cost ranging from $31 to $150. Two operators testified to purchasing office supplies; one invested seven dollars, the other $25. In addition, one operator purchased lights without being reimbursed, and one operator purchased

paint with which to paint the interior of the stand. Finally, three operators testified that they arranged to have telephones installed, and one operator testified that he had a beeper, both the telephones and the beeper were acquired for the purpose of making personal calls and receiving personal messages.

Given this record, it is difficult to understand the legal significance of the district court's true but nebulous finding that some operators invested in such items. These few, minor purchases, often for nonbusiness purposes, do not indicate legally significant investment by the operators. Most operators did not engage in such investments, and for the few who did, with a few exceptions, the cost was minimal. Indeed, the record establishes the opposite of what the district court's finding suggests. The fact that a few

operators engage in minimal investments has little legal relevance, when the overwhelming majority of the risk capital is supplied by Mr. W. See, e.g., Pilgrim Equipment, 527 F.2d at 1324; Beliz, 765 F.2d at 1328; Real, 603 F.2d at 755.

It is true, as the court pointed out, however, that nearly every operator testified to sleeping in a sleeping bag, trailer or recreational vehicle while attending the stand at night. This is hardly surprising, since the record also shows that the operators were required by Mr. W to spend the night at the stands. Thus, it is simply bootstrapping to say that this indicates a substantial investment on the part of the operators. See Pilgrim Equipment, 527 F.2d at 1313; Mednick, 508 F.2d at 301; Sureway Cleaners, 656 F.2d at 1369-70.

Second, and of equal importance, only

one operator claimed to have purchased a recreational vehicle solely for the fireworks business, and only one operator claimed to have rented a trailer for the season. At least ten operators who testified that they slept in sleeping bags or recreational vehicles purchased these items prior to becoming operators, and used such items for family recreational purposes as well as for the fireworks business.

Finally, the court found that "[t]he expense of feeding, housing and paying the employees is substantial and is solely the responsibility of the" operator. Op. at 7. There is simply no evidence in the record that the operators incurred any responsibility or expense for housing their employees, and only one operator testified that he paid to feed his helpers. It is true, however, that some operators incurred costs in paying their helpers. But this

fact is not dispositive. Pilgrim Equipment, 527 F.2d at 1312; Mednick, 508 F.2d at 301. The majority of paid helpers, as the district court found, were simply family members of the operators, and the duration and terms of their "employment" is less than clear in the record.

Mr. W further argues on appeal that because as a matter of Texas law title to merchandise under consignment passes to the consignee, the operators "owned" the fireworks, and thus that the operators "incur[red] major investments for their inventory." Brief for Appellee at 26 & n. 2. Irrespective of the validity of this statement of Texas law, a question we need not address, it has no relevance to the economic realities. The simple fact is that operators receive merchandise from Mr. W without having to pay a penny up-front, and that they can return all the

merchandise unsold without ever having to pay Mr. W. The formal label that Texas law attaches to the transaction is irrelevant--economic realities control.

The operators' relative investment must be compared with the investment of Mr. W in order to determine the degree of economic dependence. See, e.g., Pilgrim Equipment, 527 F.2d at 1314; Castillo, 704 F.2d at 192; Real, 603 F.2d at 755. The record indicates that Mr. W assumes the sole cost of providing the stands, the licenses, insurance, land on which the stands are erected, electricity for the stands, inventory for the stands without any "up-front" money by the operators, routemen to supply the stands, and advertising. The lower court failed to take into account Mr. W's considerable investment in the business before finding that the degree of investment indicates that the

operators are more akin to independent contractors with respect to investment. This finding is clearly erroneous.

Further, the court's finding that "[t]hough many [operators] made little or no investment, the opportunity to invest and increase profit certainly existed" is both clearly erroneous and derived with the wrong legal standard in mind. The court erred by considering the opportunity to invest; only the economic realities are legally relevant. See, e.g., Pilgrim Equipment, 527 F.2d at 1308. Similarly, the court's finding that the operators closed their stands at the end of the season without being compensated by Mr. W is wholly tautological and legally irrelevant. As we have been compelled to point out ad nauseum, Mr. W unilaterally prescribed the terms of the operators' compensation. Pilgrim Equipment, 527 F.2d

at 1313; Mednick, 508 F.2d at 301; Sureway Cleaners, 656 F.2d at 1369.70.

Thus, having reviewed the entire record, we are left with no doubt that "[b]ut for [Mr. W's] provision of all costly necessities, these operators could not operate. Their total dependency upon [Mr. W] is confirmed rather than denied by these facts." Pilgrim Equipment, 527 F.2d at 1314.

D. Skill and Initiative

The district court correctly found that most operators had no prior experience selling fireworks. The court, however, also found that "while no particular skill was necessary to open a stand, prior experience in sales and as a supervisor would be helpful." "[T]he more experience a[n] ... operator gained ... the more proficient he became in organizing the business to maximize profit." Thus, the

court determined that "[u]nlike the persons in Usery [v. Pilgrim Equipment Co.] the [operator] here did display initiative to increase business." Op. at 8. This finding of the lower court is clearly erroneous. The record here unmistakeably reveals, that in regard to skill and initiative, this case and Pilgrim Equipment are as similar as Castor and Pollux.

The record establishes that the most important skill that an operator could garner to enhance his or her success is the ability to develop and to maintain rapport with customers. Thus, the district court misread Pilgrim Equipment. In that case, we held that initiative, not efficiency, determines independence, and that "customer rapport is not an 'initiative' characteristic." Rather, it much more closely parallels 'efficiency.'" Id. at 1314; see Rutherford Food Corp., 67 S.Ct. at 1477.

The district court, therefore, labored under an incorrect understanding of the law.

We hold that the operators did not exhibit sufficient independent skill or initiative to indicate that they were independent contractors. As we reasoned in Pilgrim Equipment, 527 F.2d at 1314, "[r]outine work which requires industry and efficiency is not indicative of independence and nonemployee status." Indeed,

> [t]hese operators are unable to exert initiative in the operation.... All major components open to initiative--advertising, pricing, and most importantly, the choice of ... [fireworks' suppliers] with which to deal are controlled by ... [Mr. W]. Much emphasis was placed on ... the need for rapport with customers. Customer rapport is not ... "initiative...." But to the extent it requires "initiative," it is significantly controlled or at least continuously encouraged by ... [Mr. W] through the commission-rate payment arrangement. The operators received a percentage of the money paid for each item ... [sold]. Obviously,

> encouraging repeat customers enhances financial reward under this payment scheme.
>
> ...The skills required in th[is] operation ... are valuable. But many successful employees need these same abilities and perform similar tasks. The bottom line in this enterprise is the business acumen and investment contributed by ... [Mr. W].

Id. at 1314-15.

E. Permanence

Because the fireworks business is by nature seasonal, and because "[t]here is a turnover of ... operators of approximately 80%," the district court found that the relationship between Mr. W and its operators was not permanent, indicating that the operators were independent contractors. Op. at 8. Because the district court again labored under a misunderstanding of the applicable law, its finding is clearly erroneous.

We have often found seasonal workers to be "employees" within the meaning of the

Act. See, e.g., Beliz, 765 F.2d at 1329; Castillo, 704 F.2d at 186-93. We have held, moreover, that in applying the Silk factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ. Mitchell v. John R. Cowley & Bro., Inc., 292 F.2d 105,108 (5th Cir. 1961); see Dial America Marketing, 757 F.2d at 1384. Seasonal workers are by nature peripatetic. We thus hold that when an industry is seasonal, the proper test for determining permanency of the relationship is not whether the alleged employee returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season. See Donovan v. Brandel, 736 F.2d 1114, 1117, (6th Cir. 1984); Mendez v. Brady, 618 F.Supp. 579, 582 (W.D.Mich. 1985).

The record establishes beyond cavil that every operator who ever worked for Mr. W labored through the entire fireworks season. This factor, therefore, clearly points to a holding that the operators are "employees."

IV. Economic Dependence and Employee Status

The district court concluded that permanence was "the most important of all" the indicia, and that "[e]conomic dependence is totally absent in this case." The court reasoned that, because the fireworks business is seasonal, the operators rely on earnings from the "family-operated business" only "to make extra money in [their] spare time." Op. at 8, 9. In sum, the court reasoned that the operators were not economically dependent on Mr. W, but were independent contractors because "none of the [operators] make a living selling fireworks." Id. at 9. This ultimate

conclusion is wrong as a matter of law.

First, the court erred by singling out the (erroneous) finding regarding impermanence and by focusing on the operators' lack of reliance on Mr. W for subsistence to conclude that there was a lack of "economic dependence." Economic dependence cannot be determined by reference to any one or two factors. Rather, all the Silk factors must be considered and used as a guide. It is axiomatic that economic dependence is not an independent variable with a life of its own--it can only be determined in conjunction with consideration of the economic reality of all the relevant circumstances. See, e.g., Bartels, 67 S.Ct. at 1547; Rutherford Food Corp., 67 S.Ct. at 1477; Pilgrim Equipment, 527 F.2d at 1311; Castillo, 704 F.2d at 190; Robicheaux, 697 F.2d at 666; Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th

Cir. 1981); Sureway Cleaners, 656 F.2d at 1368; Real, 603 F.2d at 754. In sum, "[i]t is erroneous to focus on a single factor ... and thereby fail to consider the entire circumstances of the work relationship." Partida, 492 F.2d at 709 (citations omitted).

In addition, the court's understanding of the meaning of "economic dependence" is itself flawed. Economic dependence is not conditioned on reliance on an alleged employer for one's primary source of income, for the necessities of life. Rather, the proper test of economic dependence mandates consideration of all the factors, and in light of such consideration "examines whether the workers are dependent on a particular business organization for their continued employment" in that line of business. DialAmerica Marketing, 757 F.2d at 1385 (citing Pilgrim Equipment, 527 F.2d

at 1311) (emphasis added).

Even disregarding these mistakes, indeed even were employee status a question of fact subject to the clearly erroneous standard of review, we would be compelled to find these operators to be employees. Mr. W controls the salient aspects of the operation, the operators, the terms of the operators' compensation, and the degree to which the operators could independently affect profit and loss. Mr. W supplies nearly all the risk capital, and little initiative is required to be an operator. The operators are permanent employees. All the Silk factors, therefore, demonstrate that these operators are economically dependent on Mr. W. The operators have no independent business organization that they could market and transfer from employer to employer. See e.g., Hickey v. Arkla Industries, Inc., 699 F.2d 748, 752 (5th

Cir. 1983) (on petition for rehearing); DialAmerica, 757 F.2d at 1385; Sureway Cleaners, 656 F.2d at 1372. "[T]here is no operator who, as an economic entity, is capable of doing business elsewhere." Pilgrim Equipment, 527 F.2d at 1315. These operators are employees of Mr. W--they are not in business for themselves.

Mr. W argues in the alternative, however, that its stands are exempt from coverage under the Act as "amusement or recreational" establishments, see 29 U.S.C. Sec. 213(a)(3), or that the operators, even if employees, fall within the "outside salesman" exemption to the Act, see 29 U.S.C. Sec. 213(a)(1). We express no opinion regarding these contentions. Because the district court did not have occasion to address them in the first instance, and because they were not fully briefed by the parties, we decline the

invitation to consider these arguments initially on appeal. The case is thus REVERSED and REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 86-2170

D.C. Docket No. SA-83-CA-2548

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)
Plaintiff-Appellant,	)
v.	)
MR. W. FIREWORKS, INC.,	)
Defendant-Appellee,	)

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

J U D G M E N T

THIS CAUSE came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for Further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

April 20, 1987

ISSUED AS MANDATE: May 12, 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)
Plaintiff-Appellant,	)
v.	)
MR. W. FIREWORKS, INC.,	)
Defendant-Appellee,	)

MEMORANDUM OPINION

Plaintiff William E. Brock, Secretary of Labor, instituted this action against defendant Mr. W Fireworks, Inc. for alleged violations, from 1980 to present, of the Fair Labor Standards Act of 1938 (FLSA), as amended, Title 29 U.S.C. Section 201 et seq. Defendant, a fireworks distributor,

is charged with failing to pay employees minimum and overtime wages, and with failing to maintain accurate records. The persons involved are the operators (vendors) of defendant's fireworks stands and individuals who work for those operators. In its answer, defendant asserts, among other defenses, that the stand operators are independent contractors, not employees. The employment status of these individuals is the central issue in this case, and must be determined before any other issues become relevant. After nonjury trial, the matter was taken under advisement. Having read the pleadings and considered the evidence and exhibits, the Court is of the opinion and finds that defendant's stand operators are independent contractors not protected by the provisions of the FLSA.

Section 203(e) defines an employee as an individual employed by an employer,

while Section 203(g) provides that employ includes to suffer or permit to work. Given the remedial purposes of the legislation, an expansive definition of employee has been adopted by the courts. See United States v. Silk, 331 U.S. 704, 712, 67 S.Ct. 1463, 1467, 91 L.Ed. 1757 (1947). The common law concepts of "employee" and "independent contractor" have been rejected as determinative of who is protected by the FLSA. See, Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-27, 67 S.Ct. 1473, 1475, 91 L.Ed. 1772 (1947). The dominant factor in determining employment status is economic dependence; i.e., an employee is one who as a matter of economic reality is dependent upon the business to which he renders service. Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299-300 (5th Cir. 1975). The five considerations which have been adopted to aid in

making the determination of dependence are: degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required. Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1311 (5th Cir. 1976). The totality of the circumstances must be considered. Ibid.

Each person who operated a stand entered into a contract with defendant, and agreed to abide by certain rules and regulations. These contracts and rules, in the early seasons of the relevant period, seemingly enabled defendant to exercise control over the stands by setting hours and prices, and by prohibiting the sale of other merchandise by the operators. On the other hand, they referred to the operators as independent contractors, and gave them sole control over the day-to-day operation of the business. After an investigation by

and conversations with a compliance officer from the Department of Labor, the form of the documents changed; the operators were given suggested hours and the restriction of the sale of other merchandise was removed. Other provisions also indicate the apparent attempt to contractually make the operators independent contractors. Diana Wildman, defendant's bookkeeper-treasurer, testified that the rules are not enforced and are meant to help the vendors. Testimony was also elicited at trial that the operators considered the stands to be their business. Neither contractual recitations nor subjective intent can mandate the outcome in FLSA cases. Usery v. Pilgrim Equipment Co., Inc., supra, at 1315. This is, however, a two-edged sword. While the contractual provisions cannot suffice to create independent contractors out of employees,

neither should they be used to create employees out of independent contractors. The fact then that the contracts were drafted by defendant and not negotiated is, for the most part, insignificant. The broader economic realities are determinative. Ibid.

Control

A person interested in operating a stand must file an application. If accepted, he is given whatever stand is available. Past vendors are given their choice. The stands are built and located by defendant which obtains the necessary licenses and permits for the operators, and arranges for the lease on the land. Defendant arranges and pays for electricity and insurance for the stands. A routeman for defendant delivers the initial inventory to the operators, collects the cash when the vendors are ready to submit it,

and fills orders for additional fireworks as needed and wanted. At least one vender deposited the cash into his own account and, at the end of the season, withdrew his commission and paid the remainder to defendant. The operator's cost of leasing the stand is taken into account in its receipt of approximately 80% of the sales. After the final inventory, they receive 15% commission and pay approximately 4% in sales tax.

The Court believes that the evidence at trial, while in some respects indicating control by defendant, establishes that the operators controlled most aspects of the fireworks stand. It is significant to note that even though the early contracts and rules reserved the right of control, there was virtually no evidence that defendant ever exercised this control over the operators. The controlling economic

realities are reflected by the way one actually acts, not how one could have acted under the contract. Usery v. Pilgrim Equipment Co., Inc., supra. In fact, the evidence showed the operators ran their businesses as they pleased and that the newer contracts, which purported to give them more freedom, did not affect the operation of the stands.

Although a list of prices and tags was sent to the operators with the initial inventory, the operators considered these to be suggested prices only, and felt free to change them, which they sometimes did depending upon how well an item sold. While there was some testimony that operators opened from 9 a.m. to 12 p.m. because of their agreement with defendant, most operators controlled their own hours, and no one was ever sanctioned for opening late or closing early. One operator did

testify that after he closed the panels on his stand to block the wind on a cold night, someone stopped and admonished him the panels should remain open. Because the witness could not definitely identify this person as working for defendant, the Court finds this incident to not be probative. The operators are advised that, in accordance with state law, the stands must be attended 24 hours a day. Although the initial inventory came with suggested display instructions, the operators could and did alter the display depending upon what they felt would work best. While defendant did provide an advertisement for the benefit of all the stands, many operators, on their own to increase their business and thus their commission, advertised on radio, in the newspaper, with signs and by distribution of fliers. The vendors performed many improvements on the

premises such as painting, mowing, displaying of lights, and building fences. There was also evidence that other merchandise, including fireworks not distributed by defendant (which appeared in the final inventory), were sold at the stands. The vendors were solely responsible for hiring, setting the hours of, supervising, and paying the other persons who worked at the stands.

Considering the totality of the circumstances, the Court believes the vendors were able to operate the stands and did operate the stands independently of defendant. The many extra efforts the vendors made to increase their profits indicate they not only considered, but treated the stands as their own business. Several vendors testified they took the fireworks' stand because of the commission they could make, and would not have worked

at the stand for an hourly wage. They did their own advertising, set their own prices and hours, and controlled their own employees. They decided when to submit cash to defendant and when to order inventory and what type to order. There is no evidence that defendant enforced any rule or regulation against any vendor. After defendant placed a vendor in business, by arranging for the stand and initial inventory, the vendor took charge and controlled all aspects of the business. That was the economic reality.

Opportunity for Profit or Loss

For many of the same reasons discussed above, the opportunity for profit lay directly with the vendor. They could and did advertise, and could and did adjust prices. Some gave discounts or free fireworks to attract more business. When asked, Diana Wildman gave suggestions

concerning stocking and inventory control, to increase profit. The more experienced operators learned that courtesy to customers and the neat appearance of a stand were important to attract more business, as was knowledge of what the fireworks do. The factors which affect profit were within the control of the vendors.

They were also responsible for their entire inventory, and had to pay for any fireworks or cash that was lost or stolen. While the Court of Appeals in Usery did not feel that liability for theft losses was significant, the evidence in this cause showed a cash loss of approximately $3,000.00 by one vendor and an inventory loss of approximately $1,800.00 by another. This is more than just an added burden, and shows that each vendor is susceptible to a substantial loss. An employee would not be held responsible for such losses. It is

unlikely that a vendor would accept this risk of loss without the opportunity to make a large profit.

Investment

While defendant did reimburse the operators for some of their advertising and other expenses, many operators, in particular those who were most successful, invested their own money in the business. Vendors purchased hay, gravel and pallets to cover muddy areas around the stand, and were responsible for trash collection. Whereas in the past defendant split the cost of a portable toilet with a vendor, the operators now pay the entire cost. Vendors pay for campers, trailers, or tents they use as sleeping quarters at the stand, security systems, cash registers, computers, adding machines, "bug zappers", calculators, fans, heaters, office supplies, "beepers", telephones, insect

repellent, paint and lights. The expense of feeding, housing and paying employees is substantial and is solely the responsibility of the vendor. Setting up and closing down the stand each season takes several hours; the vendor is not paid for this time. Though many vendors made little or no investment, the opportunity to invest and increase profit certainly existed. The evidence revealed that the more successful vendors made the larger investment. They did this to increase profit and thus their commission, as an independent contractor would.

Skill

Most stand operators never sold fireworks before. The evidence showed that, while no particular skill was necessary to open a stand, prior experience in sales and as a supervisor would be helpful. Additionally, the more experience

a stand operator gained selling fireworks, the more proficient he became in organizing the business to maximize profit. Unlike the persons in Usery, the vendors here did display initiative to increase business.

Permanency

The Court has reserved analysis of this factor until last because it is the most important of all. Fireworks stands are open in Texas for two seasons each year - the Christmas-New Year season and the July 4th season. One season last 11 days, and the other 13. There is a turnover of defendant's vendors of approximately 80%. Almost all of the vendors have regular full-time jobs and work for defendant during holidays and vacation. One teacher testified he makes more money in one season than in six weeks at school. The fireworks business was used to make extra money in spare time. Economic dependence, the most

important factor in determining employment status, is totally absent in this case. Most of the stands were family businesses; the vendor employed members of his family to help him sell the fireworks. There is absolutely no evidence or indication that any person relied upon the income from such sales for their livelihood. In Rutherford Food Corporation v. McComb, supra, at 727, 67 S.Ct. at 1475, the Supreme Court stated the purpose of FLSA:

> "The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers."

It seems highly unlikely that Congress intended the FLSA to apply to the situation here. While "employee" under the FLSA is

given an expansive definition, it cannot be stretched to include the members of these family-operated businesses. The vendors exercise the control and have the opportunity for profit and loss indicative of an independent contractor. Many of them invest their own money and initiative to increase their profit. Experience increases skill which also raises profit. Most importantly, none of the vendors make a living selling fireworks. In the absence of economic dependence, the Court finds that neither the vendors nor their workers are employees within the meaning of FLSA.

SIGNED this 29th day of January, 1986.

H. F. GARCIA
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,	)	
Plaintiff-Appellant,	)	SA-83-CA-2548
v.	)	
MR. W. FIREWORKS, INC.,	)	
Defendant-Appellee,	)	

J U D G M E N T

In accordance with the Memorandum Opinion being entered contemporaneously herewith:

It is ORDERED that plaintiff William E. Brock recover nothing of and from defendant Mr. W Fireforks, Inc. All relief

requested is denied. Costs are taxed against the United States.

SIGNED this 29th day of January, 1986.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-153

In the Supreme Court of the United States

OCTOBER TERM, 1987

MR. W. FIREWORKS, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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20pp

QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review when it held numerous factual findings of the district court to be clearly erroneous or legally irrelevant and reversed the district court on the ultimate question of whether petitioner's fireworks stand operators are "employees," rather than "independent contractors," for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-153

MR. W. FIREWORKS, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A60) is reported at 814 F.2d 1042. The memorandum opinion of the district court (Pet. App. A63-A79) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A61-A62) was entered on April 20, 1987. The petition for a writ of certiorari was filed on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that imports fireworks from Asia. The fireworks are then sold at some 100 stands that petitioner owns throughout south Texas (Pet. App. A13, A15). Petitioner leased the land on which the stands were located after first checking local fireworks ordinances and conducting market and demographic surveys (*id.* at A14, A68). The stands were built by petitioner at its

warehouse, were painted a common color with petitioner's logo, and were transported to the locations selected by petitioner (*id.* at A14-A15). Petitioner procured licenses and insurance for all the stands and paid for their electricity (*id.* at A15, A68). Petitioner also paid for newspaper advertisements both to recruit stand operators and to increase business at all the stands (*id.* at A15, A71).

Petitioner recruited the operators at the beginning of each selling season, which, by Texas law, is restricted to a 13-day period preceding January 1 and an 11-day period preceding July 4 (Pet. App. A13, A77). In any given season, approximately 80% of the operators were new recruits (*id.* at A53, A77), although none was ever terminated in the middle of a season (*id.* at A55). Petitioner gave each operator a choice of locations on a first-come, first-served basis, with priority given to past operators (*id.* at A68).

Petitioner entered into a standard contract with each operator, which set forth certain rules and regulations by which the operators were expected to abide (Pet. App. A16, A66). Before 1983, the contract set hours and prices and prohibited the sale of merchandise not provided by petitioner; otherwise, it gave the operators sole control of their day-to-day operations (*id.* at A17, A66). After 1983, following an investigation by the Wage and Hour Division of the U.S. Department of Labor, the contract was modified so that the hours of operation (9 a.m. to midnight) became "suggested" and the prohibition on the sale of other merchandise was removed (*id.* at A17, A67). The terms of the pre-1983 contract, however, apparently were not enforced (*id.* at A17-A18, A67, A73), and introduction of the newer, more flexible contract "did not affect the operation of the stands" (*id.* at A70).

Petitioner provided each operator with an inventory of fireworks, filled additional orders as needed, and collected the cash from the operators (Pet. App. A68-A69). The

initial inventory came with price tags, a suggested price list, and suggested display instructions (*id.* at A18, A70-A71). The operators could deviate from the "suggested" prices, but most never did so (*id.* at A23-A24, A70). Similarly, only a few of the operators sold any merchandise other than petitioner's fireworks (*id.* at A30-A31, A72), and one testified that he did not follow the suggested display instructions (*id.* at A27, A71). There was also some deviation from the suggested hours of operation (9 a.m. to midnight), but none from the requirement, imposed by petitioner in accordance with its understanding of applicable state law, that the operator or a helper be on the premises 24 hours a day (*id.* at A25-A26, A70-A71).

The operators received the merchandise without having to pay any money in advance (Pet. App. A47). They returned any unsold merchandise, and most were paid a commission of 15% on the merchandise that was sold (*id.* at A19-A20, A47-A48, A69). The operators bore the cost of any losses resulting from theft or other causes (*id.* at A20, A38, A74). The operators were also responsible for hiring and paying any other persons who worked at the stands (*id.* at A46, A72), the majority of whom were family members (*id.* at A47, A78). In other respects, "many vendors made little or no investment" (*id.* at A76), but "many operators, in particular those who were most successful, invested their own money in the business" (*id.* at A75). Thus, a number of operators incurred additional expenses by purchasing or providing such miscellaneous items as their own advertising, trash removal, coverings for muddy areas, portable toilets, sleeping quarters, security systems, and office supplies (*id.* at A41-A44, A75-A76). Several of these items, however, were originally purchased for purposes unrelated to operating the fireworks stands (*id.* at A42-A46). In addition, petitioner reimbursed the operators for some of their advertising and other expenses (*id.* at A75).

2. The Secretary of Labor brought suit against petitioner, alleging continuing violations of the recordkeeping, minimum wage, and overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.* (Pet. App. A2, A63). Petitioner defended against the allegations on the ground that the stand opertors are independent contractors, not employees (*id.* at A64).[1] The district court ruled in favor of petitioner in a memorandum decision that did not distinguish between findings of fact and conclusions of law (*id.* at A63-A79).

The district court considered five factors, derived from *United States* v. *Silk*, 331 U.S. 704, 716 (1947),[2] to help it determine, based on the totality of the circumstances, whether the "dominant factor" in determining employment status—"economic dependence"—was present in this case: degree of control, opportunities for profit and loss, investment in facilities, skill required, and permanence of relationship (Pet. App. A65-A66).[3] The court concluded, based on its examination of the record evidence, that all of these factors indicated independent contractor status (*id.* at A79):

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[1] Petitioner also argued (see Pet. App. A59) that its stands are exempt from coverage under the Act as "amusement or recreational" establishments (see 29 U.S.C. 213(a)(3)), and that the operators, even if employees, fall within the "outside salesman" exemption to the Act (see 29 U.S.C. 213(a)(1)). Petitioner further argued that the commissions received were sufficient to discharge any liability under the Act (see 29 U.S.C. 207(i); Pet. 6). The district court did not reach these questions, and the court of appeals remanded for their consideration (Pet. App. A59-A60).

[2] In *Silk*, these factors were first applied to a determination of employee status in the context of the Social Security Act.

[3] The court defined "economic dependence" in the following terms: "an employee is one who as a matter of economic reality is dependent upon the business to which he renders service" (Pet. App. A65).

> The vendors exercise the control and have the opportunity for profit and loss indicative of an independent contractor. Many of them invest their own money and initiative to increase their profit. Experience increases skill which also raises profit. Most importantly, none of the vendors make a living selling fireworks.

Moreover, the court held that economic dependence had not been established because none of the operators "relied upon the income from such [fireworks] sales for their livelihood" (*id.* at A77-A78). Thus, in the court's view, "[w]hile 'employee' under the FLSA is given an expansive definition, it cannot be stretched to include the members of these family-operated businesses" (*id.* at A78-A79).

3. The court of appeals reversed and remanded (Pet. App. A1-A60). The court first noted that the five-part *Silk* test used by the district court was appropriate (*id.* at A4, A21). The court of appeals cautioned, however, that these five factors must not be applied mechanically, but rather "must always be aimed at an assessment of the 'economic dependence' of the putative employees, the touchstone for this totality of the circumstances test" (*id.* at A5).

The court further stated that there are "three types of findings involved in determining whether one is an employee within the meaning of the [FLSA]": (1) "historical findings of fact" (*e.g.*, whether petitioner controlled the number of hours that an operator must be at a stand); (2) "those findings as to the *Silk* factors themselves"; and (3) the "ultimate conclusion" as to whether the workers at issue are "employees" or "independent contractors" (Pet. App. A7-A11). Explicitly relying on *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), the court stated that historical facts and findings related to the *Silk* factors are subject to the "clearly

erroneous" standard of review,[4] but that "the ultimate finding as to employee status * * * is a legal conclusion * * * subject to *de novo* consideration by this court" (Pet. App. A11).

After "carefully canvassing the entire record" (Pet. App. A21), the court concluded that a number of important district court findings were clearly erroneous. On the issue of control, the court held that "[t]he entire record clearly and unmistak[ably] demonstrates that all 'meaningful' aspects of this business are controlled by [petitioner] and that the operators are economically dependent on [petitioner]. Indeed, the operators could not function without [petitioner]." *Id.* at A34-A35. On the issue of opportunity for profit and loss, the court held that "the opportunity for profit and loss is controlled mainly by [petitioner], and that this factor points to economic dependence" (*id.* at A40). On the issue of investment, the court held that "the overwhelming majority of the risk capital is supplied by [petitioner]" (*id.* at A45); paraphrasing *Usery* v. *Pilgrim Equip. Co.*, 527 F.2d 1308, 1314 (5th Cir.), cert. denied, 429 U.S. 826 (1976), the court also observed that, "[b]ut for [petitioner's] provision of all costly necessities, these operators could not operate" (Pet. App. A50). On the issue of skill and initiative, the court held that "the operators did not exhibit sufficient independent skill or initiative to indicate that they were independent contractors" (*id.* at A52). On the issue of permanence, the court held that the operators' relationship to

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[4] Citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), the court characterized that standard, prescribed by Fed. R. Civ. P. 52(a), as permitting it to set aside factual findings of the district court only "if we have a firm and definite conviction that a mistake has been made" (Pet. App. A9). The court added two caveats to this precept: first, the standard "must not serve as an excuse to avoid comprehensively canvas[s]ing the record with great care," and second, "we must ensure that the factfinding of the district court is performed with the proper legal standards in mind" (*id.* at A9-A10).

petitioner was permanent because they worked for the entire operative period of the fireworks season (*id.* at A54-A55).

The court of appeals also held that the district court's ultimate conclusion on the question of economic dependence was wrong as a matter of law because the district court overemphasized its erroneous finding regarding the impermanence of the employment relationship to the virtual exclusion of all other factors. Moreover, the court of appeals regarded the lower court's understanding of "economic dependence" as flawed (Pet. App. A51). Specifically, the district court failed to consider that, in a seasonal business, economic dependence does not require "reliance on an alleged employer for one's primary source of income" but requires examination, in light of all the circumstances, of " 'whether the workers are dependent on a particular business organization for their continued employment' in that line of business." Pet. App. A57 (quoting *Donovan* v. *DialAmerica Mktg.*, 757 F.2d 1376, 1385 (3d Cir.), cert. denied, 474 U.S. 919 (1985)). The court concluded that, judged by this legal standard, the fireworks stand operators were employees, not independent contractors, because they were economically dependent on petitioner and "not in business for themselves" (Pet. App. A59).[5]

ARGUMENT

The court of appeals applied the appropriate standards of review and reached the correct legal conclusion. The decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

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[5] The court also held that "even were employee status a question of fact subject to the clearly erroneous standard of review, we would be compelled to find these operators to be employees" (Pet. App. A58).

1. The FLSA was enacted in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (29 U.S.C. 202; see *Mitchell* v. *Robert DeMario Jewelry*, 361 U.S. 288 (1960)). The Act accomplishes this goal principally by raising substandard wages and by giving additional compensation for overtime work to those employees within its ambit. 29 U.S.C. 206, 207; *United States* v. *Rosenwasser*, 323 U.S. 360, 361 (1945); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947). As remedial social legislation, the FLSA must be liberally interpreted " 'to apply to the furthest reaches consistent with congressional direction.' " *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)). At the same time, exemptions from the FLSA's requirements are appropriate only if they are " 'plainly and unmistakably within [the FLSA's] terms and spirit.' " *Citicorp Indus. Credit, Inc.* v. *Brock*, No. 86-88 (June 22, 1987), slip op. 8 (quoting *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)).

In keeping with its purpose, the FLSA defines "employee" and "employ" in the broadest possible terms. See 81 Cong. Rec. 7657 (1937) (remarks of Sen. Hugo L. Black) (the term "employee" has been given "the broadest definition that has ever been included in any one act"); *Alamo Found.*, 471 U.S. at 295; *Rutherford*, 331 U.S. at 728; *Rosenwasser*, 323 U.S. at 362-363.[6] As this Court has

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[6] Section 3 of the Act, 29 U.S.C. (& Supp. III) 203, includes these definitions:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> (e)(1) * * * "[E]mployee" means any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

said, "in determining who are 'employees' under the [FLSA], common law employee categories or employer-employee classifications under other statutes are not of controlling significance. * * * This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-151 (1947). Accordingly, it is the "economic reality" of the relationship, and not labels derived from prior contract or custom, that determines employee status under the Act. *Alamo Found.*, 471 U.S. at 301; *Goldberg* v. *Whitaker House Coop.*, 366 U.S. 28, 33 (1961); cf. *Silk*, 331 U.S. at 713.

Broad as it is, however, the FLSA "is not so broad as to include those 'who, without any express or implied compensation agreement, might work for their own advantage on the premises of another' " (*Rutherford*, 331 U.S. at 728-729 (quoting *Portland Terminal Co.*, 330 U.S. at 152)). Independent contractors are therefore excluded from its coverage (*Rutherford*, 331 U.S. at 722). To distinguish between employees and independent contractors, courts have frequently considered the factors of control, opportunity for profit and loss, skill and initiative, investment, and permanence first applied by this Court in *Silk*.[7] See, *e.g.*, *Rutherford*, 331 U.S. at 722-723, 729-731; *DialAmerica Mktg.*, 757 F.2d at 1382; *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Robicheaux* v. *Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983); *Pilgrim Equip. Co.*, 527 F.2d at 1311; *Donovan* v. *Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir.

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[7] A sixth factor—whether the service rendered is an integral part of the alleged employer's business—has sometimes been separately identified. *DialAmerica Mktg.*, 757 F.2d at 1382; *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); see also *Silk*, 331 U.S. at 716; *Rutherford*, 331 U.S. at 722.

1981). But "[n]o one [factor] is controlling nor is the list complete" (*Silk*, 331 U.S. at 716). Instead, "[w]hether an employer-employee relationship exists depends 'upon the circumstances of the whole activity,' * * * and, ultimately whether, as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.' " *Sureway Cleaners*, 656 F.2d at 1370 (quoting *Rutherford*, 331 U.S. at 730, and *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947)); accord *DialAmerica Mktg.*, 757 F.2d at 1382; *Pilgrim Equip. Co.*, 527 F.2d at 1311.

2. Petitioner's primary argument (Pet. 14-25) is that the court of appeals misapplied the clearly erroneous standard in reversing a number of the district court's findings of fact. To the contrary, the court of appeals faithfully followed this Court's precedent in limiting its scrutiny to patent errors.

In applying the "clearly erroneous" standard, the court of appeals was guided (see Pet. App. A9) by the principle that " '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The court (Pet. App. A9) further recognized that the "clearly erroneous" standard does not preclude an appellate court from "canvas[s]ing the record." Rather, the Rule 52(a) standard invites a comprehensive reading of the record to determine whether, "although there is evidence to support [them]," the district court's findings were mistaken "on the entire evidence" (*United States Gypsum Co.*, 333 U.S. at 395, *quoted in Anderson*, 470 U.S. at 573; see *Bose Corp.* v. *Consumers Union of United States*, 466 U.S. 485, 499 (1984) ("Rule 52(a) never forbids such an examination" of the entire record)). Although it is not the reviewing court's role to reverse a decision simply because it would have weighed the evidence differently,

scrutiny of the entire record nevertheless is necessary for the court of appeals to determine faithfully whether the district court's view of the evidence is a permissible one (see *Anderson,* 470 U.S. at 574). Indeed, in *Anderson,* this Court itself reviewed the record carefully before determining that the court of appeals had exceeded its review function, and Justice Powell noted, in concurrence, that *Anderson* should not be read "as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case" (*id.* at 581).

The court of appeals in this case, after a careful review of the record and applicable legal precedent, formed the "definite and firm conviction" that many of the district court's factual findings were mistaken or, in several instances, irrelevant or based on erroneous legal standards (Pet. App. A21-A22, A35). Indeed, the court's close examination of the district court's findings convinced it that the trial court had drawn impermissible inferences as to each of the five *Silk* factors. These, in the court's judgment, could only be characterized as clearly erroneous (see *id.* at A34-A35, A37, A40, A48-A51, A55). The court of appeals therefore determined that the "entire evidence" regarding each of the *Silk* factors pointed in only one direction, toward a finding of economic dependence.

Thus, there is no merit in petitioner's contention (Pet. 23) that the court of appeals simply "duplicate[d] the role of the district court and engage[d] in its own fact finding." On the contrary, the court of appeals reversed the district court's findings only when the record "clearly and unmistak[ably]" demonstrated that those findings were in error (see Pet. App. A34 (regarding factor of control)); *id.* at A50 ("having reviewed the entire record, we are left with no doubt" on the factor of investment); *id.* at A51 ("the record [on skill and initiative is] unmistakab[le]"); *id.* at A55 ("the record establishes beyond cavil" the factor of

permanence)). Typical of the court's methodology is its analysis of the district court's finding (*id.* at A71) that, "[a]lthough the initial inventory came with suggested display instructions, the operators could and did alter the display depending upon what they felt would work best." On reading the record, the court of appeals discovered that "[s]ix operators unequivocally testified that they followed [petitioner's] display instructions to the letter; only one testified that he did not follow them" (*id.* at A27). Therefore, the court of appeals reasonably concluded that the district court's finding on this point was clearly erroneous. The fact that the court of appeals found many such errors throughout the district court's decision does not mean that the "clearly erroneous" standard was not being properly applied, but only that the district court had drawn mistaken inferences from the record on numerous occasions.

Furthermore, as in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), the court of appeals "was quite right in saying [see Pet. App. A10] that [to the extent the] district court's findings rest on an erroneous view of the law, they may be set aside on that basis." See also *Bose Corp.*, 466 U.S. at 501 ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). We recognize, of course, that, "[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings" (*Pullman-Standard*, 456 U.S. at 291; see also *Icicle Seafoods*, 475 U.S. at 714). But

remand was unnecessary in this case since "the record permits only one resolution of the factual issue" (*Pullman-Standard,* 456 U.S. at 292 (citing *Kelley* v. *Southern Pac. Co.,* 419 U.S. 318, 331-332 (1974)); accord *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534-537 (1979); *Bigelow* v. *Virginia,* 421 U.S. 809, 826-827 (1975); *Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162, 170 (1967)).[8] Having found that the district court's decision rested on an erroneous view of the law and was factually unsupported, the court of appeals was correct to reverse, thereby bringing its decision into line with abundant precedent that had been established in analogous cases. See, *e.g., Usery* v. *Pilgrim Equip. Co., supra; Donovan* v. *DialAmerica Mktg., supra; Donovan* v. *Sureway Cleaners, supra;* see also *Donovan* v. *Brandel,* 736 F.2d 1114 (6th Cir. 1984).

3. Petitioner further argues (Pet. 25-29) that the determination by the court of appeals that the ultimate question of employee status is a question of law subject to de novo review is contrary to the holding of *Icicle Seafoods.* Petitioner has misunderstood that decision.

At issue in *Icicle Seafoods* was whether individuals who performed maintenance on a vessel that processed fish fell within the "seaman" exception to the FLSA (see 29 U.S.C. 213(b)(6)). The court of appeals, reversing the judgment of the district court, held that those individuals were industrial maintenance employees and not seamen. The court of appeals first enunciated a different legal standard for

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[8] A determination, like the one made by the court below, that the record yields only one permissible interpretation must be made on the "entire record," viewed in light of the proper legal determinations, and does not require a remand simply because there is some "evidence to support [the district court's decision]." See *Anderson,* 470 U.S. at 564; *United States Gypsum Co.,* 333 U.S. at 395.

what constitutes a "seaman" (475 U.S. at 713).[9] Applying that standard to the evidence in the record, the court found that plaintiffs were not seamen because their " 'dominant employment' * * * was 'industrial maintenance,' and that the 'maritime work' that [they] performed took but a small portion of their work time" (*ibid.*).

This Court, in turn, reversed the court of appeals because it had engaged in its own de novo factfinding under the different legal standard that it had adopted (*Icicle Seafoods,* 475 U.S. at 714).[10] Contrary to petitioner's assertion (Pet. 26-28), however, this Court did not suggest that the ultimate issue of the applicability of an FLSA exemption is other than a legal question. Indeed, the Court explicitly stated (475 U.S. at 714):

> The question of how the respondents spent their working time on board the [vessel] is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law.

The court of appeals was thus to be faulted not for rendering judgment on the ultimate legal issue of whether the exemption applies, but for making its own findings on

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[9] "The Court of Appeals seems to have believed that the District Court applied the wrong legal standard for what constitutes a 'seaman' under § 213(b)(6). Whereas the District Court concluded that respondents were seamen because they performed work of a maritime character on navigable waters, * * * the Court of Appeals held that under the pertinent regulations, the critical factor for determining whether an employee on a vessel is a seaman is whether his 'duties primarily aid navigation of the vessel.' " *Icicle Seafoods,* 475 U.S. at 713.

[10] This Court particularly faulted the court of appeals because "nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them" (*Icicle Seafoods,* 475 U.S. at 713). The present case obviously stands on a far different footing.

those facts necessary to a proper determination of that legal question.

This is especially clear from the Court's discussion reconciling its own prior decisions in *Rutherford Food Corp.* v. *McComb, supra,* and *Walling* v. *General Industries Co.,* 330 U.S. 545 (1947). The Court explained that in *Rutherford* it had engaged in de novo review because the focus was on a "legal question"—*i.e.,* whether, on the entire record, the individuals were independent contractors for purposes of the FLSA—and the case was not concerned with "the allocation of fact-finding responsibilities between district courts and courts of appeals" (*Icicle Seafoods,* 475 U.S. at 713). In *General Industries,* on the other hand, the holding was that "the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a)" (*Icicle Seafoods,* 475 U.S. at 713). In reaffirming *General Industries,* the Court thus distinguished sharply between the ultimate legal issue of whether an FLSA exemption applies, and the finding of "the facts necessary" to the making of that determination, which is done initially by the district court subject to appellate review under the "clearly erroneous" standard. Accordingly, the court of appeals was entirely correct to conclude that *Icicle Seafoods* "strongly support[s]" (Pet. App. A12) the position that it has taken here and in previous cases (see, *e.g., Beliz* v. *W.H. McLeod & Sons Packing Co.,* 765 F.2d 1317, 1327 & n.24 (5th Cir. 1985)) that "the ultimate determination of employee status is a finding of law subject to *de novo* consideration by this court" (Pet. App. A11).[11]

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[11]Petitioner complains (Pet. 28) that the court of appeals rejected prior Fifth Circuit cases holding that employee status is a question of fact. Whatever the merits of that contention (which petitioner chose not to advance in a petition for rehearing or suggestion of rehearing en

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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banc), it is a matter for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no intracircuit conflict, because the holdings of the cases that petitioner cites regarding the standard of review had already been rejected by the Fifth Circuit in *Beliz*, 765 F.2d at 1327 & n.24, and, in any event, are contrary to *Icicle Seafoods*. See Pet. App. A11-A12.

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